NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 18-1092

(Consolidated with 18-1156, 18-1228)

DIRECTSAT USA LLC,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement from an Order of the National Labor Relations Board in NLRB No. 13-CA-176621

FINAL BRIEF FOR PETITIONER

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February 1, 2019

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. Parties and Amici.

A. Petitioner DirectSat USA, LLC ("DirectSat" or "Petitioner") submits the following as a list of known parties appearing in this Court in this matter:

National Labor Relations Board, Respondent

DirectSat USA LLC, Petitioner

B. DirectSat submits the following as a list of known intervenors appearing in this Court in this matter:

None

C. DirectSat submits the following as a list of known amici appearing in this Court in this matter:

None

II. Ruling Under Review.

The following ruling issued by the National Labor Relations Board is at issue in this matter:

DirectSat USA, LLC *and* International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO, Case No. 13-CA-176621, reported at 366 NLRB No. 40; issued March 20, 2018.

III. Related Cases.

This matter on review has not previously been before this Court or any other court. However, there is a related case on appeal before this Court in Case No. 18-1228. On April 4, 2018, DirecTV, LLC, ("DirecTV"), which was not a party to the underlying proceeding, filed a motion to intervene, to reopen the record, and for reconsideration of the Board's Decision and Order at issue on this appeal. The Board denied DirecTV's motion in NLRB case 13-CA-176621, entered July 25, 2018 and published at 366 NLRB No. 141. On August 27, 2018, DirecTV filed a petition for review with this Court. By Order dated September 21, 2018, this Court granted the NLRB's unopposed motion to consolidate the instant case, Nos. 18-1092 et al., with Case No. 18-1228.

Respectfully submitted,

JACKSON LEWIS P.C.

By: /s/ Eric P. Simon

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1 and to enable the members of this Court to evaluate possible disqualification or recusal, the undersigned counsel for Petitioner hereby certifies that DirectSat is owned by UniTek USA, LLC, which in turn is owned by Unitek Acquisition, Inc., which in turn is owned by UniTek Global Services, Inc., the majority of which is owned by Littlejohn & Co. (a private company) and New Mountain Finance Corporation, a publicly traded company. DirectSat installs and services satellite television equipment.

Respectfully submitted,

JACKSON LEWIS P.C.

By: */s/ Eric P. Simon*

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GLOSSARY

"CBA" means collective bargaining agreement

"DirectSat" or "Employer" means DirectSat USA, LLC

"HSP agreement" means the Home Service Provider agreement between DirectSat and DirecTV pursuant to which DirectSat installs and services satellite DirecTV television equipment.

"JA ___" means references to the Joint Appendix

"NLRA" or "Act" means the National Labor Relations Act

"NLRB" or "the Board" means the National Labor Relations Board

"Union" means International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO (IBEW)

STATEMENT IN SUPPORT OF ORAL ARGUMENT

DirectSat respectfully requests oral argument in this case. In light of the factual and legal issues presented regarding the obligation to produce information pursuant to the NLRA and cases cited herein, oral argument will assist the Court in reaching a complete understanding of the issues and permit counsel to address any questions from the panel.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Section 10(f) of the NLRA because the Decision and Order of Respondent, NLRB, is a final order. 29 U.S.C. § 160(f). DirectSat is a party aggrieved by that Decision and Order. DirectSat timely filed its Petition for Review on April 4, 2018.

STATEMENT OF ISSUES

1. Whether DirectSat's Petition for Review should be granted and the Board's Cross-Application for Enforcement denied, because in issuing its Decision and Order, the Board improperly ordered DirectSat to provide the Union with a full, unredacted copy of the HSP agreement between DirectSat and DirecTV?

2. Whether DirectSat's Petition for Review should be granted and the Board's Cross-Application for Enforcement denied, because the Board's Decision and Order contravenes established Board precedent?

3. Whether DirectSat's Petition for Review should be granted and the Board's Cross-Application for Enforcement denied, because the Board's Decision and Order is arbitrary, not supported by substantial evidence, and not in accordance with law?

RELEVANT STATUTES AND REGULATIONS

Relevant provisions of the NLRA are contained in the Addendum at the conclusion of this brief.

STATEMENT OF THE CASE

DirectSat installs and services DirecTV satellite television equipment pursuant to the HSP agreement with DirecTV. The Union represents a unit of DirectSat's installation and service technicians. DirectSat and the Union (together "Parties") have been engaged in collective bargaining since 2014. During the course of extensive first contract negotiations, the Union requested a full, unredacted copy of the HSP agreement in the context of two discrete issues: the definition of unit work and the extent of DirecTV control over DirectSat.

The Union first requested the HSP agreement in November 2015 in response to DirectSat's proposal regarding the definition of unit work. The proposal referenced services DirectSat provided to DirecTV pursuant to the HSP agreement. In response, DirectSat provided that portion of the HSP agreement describing the

services it provides to DirecTV. The Union never asserted the response was inadequate or otherwise articulated why the response provided was insufficient.

In May 2016, the Union again requested the HSP agreement but asserted a new and different reason for its request. No longer asserting it needed the full, unredacted HSP agreement in connection with any proposal advanced at the bargaining table, the Union now asserted it wanted to evaluate the extent of control of DirecTV on DirectSat. However, the Union never provided any objective facts demonstrating reasonable basis to believe DirecTV controlled terms and conditions of employment of DirectSat employees. Moreover, the full, unredacted HSP agreement was not presumptively relevant as it did not directly relate to the employment terms and conditions of unit employees. The relevance of the full, unredacted HSP agreement was not apparent to DirectSat under the circumstances. Accordingly, DirectSat was not obligated to furnish the Union the full HSP Agreement.

The instant Petition for Review seeks reversal of the Board's arbitrary and capricious Decision and Order, which found, in a single paragraph without citation to any case law, that DirectSat had a duty to furnish the full, unredacted HSP agreement in order for the Union to evaluate the extent of work covered by DirectSat's New Product Lines proposal. The Board's finding is improper because neither the ALJ nor the Board found that any provision of the full, unredacted HSP

agreement beyond those DirectSat provided was relevant to any issue in bargaining *before* finding that the Union was entitled to such information, as is required as a matter of law.

In addition, in contravention of established precedent and public policy, the Board's Order is predicated upon an illogically circular and untenable legal premise. If the Board's decision is left undisturbed, a union is vested with unfettered access to information that is not presumptively relevant simply because the employer asserts that the requested information is not relevant. Taken to its logical end, the Board's ruling deprives employers the right to challenge the relevancy of requested information without waiving that same objection. For this reason and as explained more fully below, DirectSat's Petition for Review should be granted, and the Board's Cross-Application for Enforcement should be denied.

I. Background and Procedural History

DirectSat installs and services satellite television equipment for DirecTV pursuant to the HSP agreement with DirecTV. (JA 56). On February 2014, the Union was certified as the exclusive collective-bargaining representative of the following employees of DirectSat for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located at 9951 W 190th St, Mokena, Illinois, 60448, but excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.

(JA 56-57). Subsequent to the certification of the Union, the facility was relocated to South Holland, Illinois. The Union's representational status was unaffected by this relocation. (JA 56).

During the course of extensive negotiations over an initial CBA, the Union made multiple requests for a full, unredacted copy of the HSP agreement. (JA 57-59). In November 2015, the Union first requested the HSP agreement in response to DirectSat's proposal that referenced the definition of "products and services" as provided in the HSP agreement. (JA 57, 83). Less than two weeks later, DirectSat provided the relevant portion of the HSP agreement, which described the products and services it covered. (JA 58, 86). The Union never asserted the provided information was inadequate or otherwise insufficient to enable it to bargain over the scope of work issue. Rather, the Union submitted a counter proposal, which also referenced the HSP agreement.

In February 2016, the Union again asked for a full copy of the HSP agreement, this time asserting a new and different reason for its request – "to understand the relationship" between DirectSat and DirecTV. (JA 58, 92). DirectSat denied this request because the requested information was not presumptively relevant. (JA 58,

93). In March 2016, the Union again modified the basis for its request for the full HSP agreement, this time asserting it was needed "particularly because of the reference [to the HSP agreement] in the New Product Lines proposal." (JA 59, 94). A few days later, at a March 22, 2016 bargaining session, DirectSat reminded the Union that it had already provided the Union with all the relevant portions of the HSP agreement. (JA 59).

In May 2016, the Union changed course yet again and asserted that now it wanted the full HSP agreement, not because of DirectSat's New Product Lines proposal, but rather because it wanted "to evaluate the extent of control" of DirectSat by DirecTV. (JA 59, 103). Because DirectSat had never claimed that DirecTV had any control over the Parties' negotiations, and because the relevance of the information was in no way apparent to DirectSat under the circumstances, DirectSat did not supplement its response. (JA 60, 105).

On May 20, 2016, the Union filed the subject unfair labor practice charge alleging DirectSat violated the Act by refusing to furnish to the Union the full, unredacted copy of the HSP agreement. (JA 43). On September 23, 2016, the Regional Office issued a Complaint. (JA 43-49). The Complaint broadly alleged that the HSP agreement was necessary and relevant to the Union's performance of its duties as the exclusive-bargaining representative of bargaining unit employees, and DirectSat violated 8(a)(5) and (1) of the Act by refusing to provide the Union with

a full, unredacted copy of the HSP agreement. Significantly, in the Complaint, the General Counsel failed to allege any facts to support the relevance of the full, unredacted HSP agreement. (JA 43-49).

On April 10, 2017, the parties filed a joint motion requesting that the case be decided without a hearing and instead based on a stipulated record and set of facts. (JA 54-106). On April 14, 2017, Administrative Law Judge Charles J. Muhl ("ALJ Muhl") granted the motion and approved the stipulation of facts. Thereafter, the parties filed briefs on May 26, 2017. (JA 109-200).

The General Counsel's entire theory of the case rested on the false assumption that DirectSat and DirecTV were joint employers. The General Counsel argued that the full, unredacted HSP agreement was relevant and thus subject to production because the Union: 1) needed to determine if DirectSat and DirecTV were joint employers for purposes of collective bargaining; and 2) was entitled to verify the accuracy of DirectSat's claims concerning its relationship with DirecTV. (JA 206-209). The General Counsel alleged nothing else.

II. The Administrative Law Judge's Decision

On July 20, 2017, ALJ Muhl issued his Decision and Recommended Order, improperly finding DirectSat had a duty to furnish the Union with a full, unredacted

copy of the HSP agreement. (JA 201-216; 260-266).[1] ALJ Muhl's erroneous finding was predicated upon a theory that the General Counsel *never* advanced and unsupported by any Board precedent – the Union's right to verify the non-existence of relevant information.

The ALJ rejected in their entirety, both of the theories the General Counsel proffered. (JA 265, fn. 22). First, ALJ Muhl correctly concluded the General Counsel did not demonstrate the relevance of the full HSP agreement because the "stipulated facts do not establish the Union had an objective basis for believing the Respondent and DirecTV were joint employers, at the time it made the information requests." (JA 263). Second, ALJ Muhl correctly concluded the relevance of the full HSP agreement could not depend upon the Union's need to verify the existence of a joint-employer relationship because DirectSat never asserted that DirecTV had any control over the bargaining unit's terms and conditions of employment. (JA 264).

However, instead of dismissing the Complaint because the General Counsel did not prove either of its theories of a violation of the Act, the ALJ proffered his own theory and found the Union had the right to verify that DirectSat "furnished all the relevant portions of the HSP agreement on the scope-of-unit-work issue." Id. In

[1] The Administrative Law Judge's Decision is included in the Joint Appendix at pages 201-216 and is also annexed to the NLRB's Decision and Order at pages 260-266. Hereinafter, Petitioner, DirectSat, cites to the Decision at pages 260-266.

other words, according to the ALJ, the Union was entitled to the full HSP agreement solely because DirectSat asserted the full HSP agreement was not relevant.

III. Exceptions

On September 14, 2017, DirectSat filed Exceptions to ALJ Muhl's Decision on the following grounds: 1) the ALJ erred as a matter of law because there was no finding of relevance of the full, unredacted HSP Agreement, and instead the ALJ premised the duty to furnish the full, unredacted HSP agreement on an unlitigated theory rooted in circular reasoning unsupported by NLRB precedent; and 2) the ALJ violated DirectSat's due process rights because DirectSat did not have an opportunity to address this unlitigated theory before the ALJ. (JA 222-225).

On October 19, 2017, the General Counsel filed its answering brief. (JA 228-237). On October 23, 2017, the Union filed its answering brief. (JA 240-248). On November 2, 2017, DirectSat filed its reply brief. (JA 249-257).

IV. The Board's March 20, 2018 Decision and Order

On March 20, 2018, the NLRB issued its Decision and Order adopting the ALJ's recommended Order. (JA 258-259). Most of the Board's two-page Decision and Order addressed the due process violation DirectSat asserted. (JA 258). One four-sentence paragraph without citation to any case law addressed the merits of the ALJ's findings. (JA 259).

The Board adopted all of the ALJ's findings and conclusions except it did not rely on the ALJ's statement that, for information requests relating to matters not directly related to the bargaining unit such as the request for the full, unredacted HSP agreement, the relevance "standard is somewhat narrower and relevance is required to be more precise." (JA 258, fn. 2). The Board explained the information request at issue was subject to a "discovery-type" standard. Id. As a result, according to the Board, the Union could meet its burden to prove the relevance of the full, unredacted HSP agreement by either "a reasonable belief, supported by objective evidence" or "a probability that the desired information is relevant." Id. (Internal citations omitted).

The Board never specified which standard it applied in this case. Even assuming the Board found relevance of the full, unredacted HSP agreement was established under either test, like the ALJ, it *never identified* any "objective evidence" supporting a "reasonable belief" of relevance or any facts showing "a probability" that the full, unredacted HSP agreement was relevant. Further, even though DirectSat raised the issue in its exceptions brief, the Board never addressed the inherently flawed logic of the ALJ – that in the absence of the Union establishing the relevance of information in the first instance, the Union should be permitted to verify the employer's challenge to relevance by means of unfettered access to that very same information.

Then, in the four-sentence paragraph of the Decision and Order addressing the merits, the Board, without citing to any case law in support, layered on another theory to conclude why, in the Board's view, DirectSat had a duty to furnish the Union with a full, unredacted copy of the HSP agreement. The Board wrote:

> As to the merits of the judge's finding, we agree that the Respondent was obligated to provide the full, unredacted HSP to the Union in order for the Union to evaluate the extent of work covered by the Respondent's proposal. We observe that the Respondent's proposal with regard to new product lines effectively amounted to having the scope of bargaining-unit work defined by the HSP. A union cannot be reasonably expected to integrate another agreement between the employer and a third party into its own collective-bargaining agreement without having a complete understanding of the contents of the incorporated document and the context of the relevant portions within the document as a whole. The Respondent thus rendered the entire HSP relevant to the negotiation, giving rise to a duty to provide the full, unredacted document to the Union. [(JA 259).]

This finding is improperly predicated on the erroneous conclusion that DirectSat proposed to incorporate the entire HSP agreement into the CBA in its New Product Lines proposal. Rather, as the stipulated facts make clear, in its scope of work proposal, DirectSat merely referenced "products and services" as defined in the HSP agreement, and DirectSat provided all of the portions of the HSP agreement

describing those products and services. (JA 58, 86-91).[2] The Board's theory that DirectSat's New Product Lines proposal incorporated the entire HSP Agreement, like the ALJ's theory, was also never litigated.

The Decision and Order should be reversed because the Board: 1) departed from established precedent requiring a party seeking information not presumptively relevant to first establish the relevance of the requested information; 2) adopted the ALJ's illogically circular conclusion – that the Union is entitled to verify the absence of relevant information by obtaining such information without first establishing its relevance; and 3) denied DirectSat's due process rights by finding a violation of the Act even though no facts were ever presented to support the relevance of the full, unredacted HSP agreement. For these reasons, fully explained herein, DirectSat's Petition for Review should be granted and the Board's Cross-Application for Enforcement should be denied.

V. Further Proceedings Before the Board

After the Board issued its Decision and Order, on April 4, 2018, DirecTV, which is not a party to this proceeding, filed a motion with the Board to intervene, reopen the record, and for reconsideration of the Board's Decision and Order. (JA 267-279). The General Counsel and the Charging Party filed a joint opposition and

[2] The record demonstrates the Union was willing to accept a reference to the HSP agreement into the CBA because the Union included reference to the HSP agreement in its counter-proposal without having a full, unredacted copy of it. (JA 95).

DirecTV filed a reply. (JA 280-285; 286-296). DirectSat took no position on DirecTV's motion. DirecTV asserted that the Board should reopen the record and reconsider the Decision and Order because DirecTV did not have an opportunity to defend its interest in maintaining the confidentiality of the HSP agreement. DirecTV argued that the HSP agreement contained non-public information that DirecTV views as confidential and proprietary. The Board denied DirecTV's motion to intervene as untimely. (JA 297-299). On August 27, 2018, DirecTV timely filed a Petition for Review the Board's denial of its motion to this Court.

VI. Petition for Review

On April 3, 2018, DirectSat filed its Petition for Review with this Court. (USCA Case # 18-1092, Doc. No. 1725577). On May 11, 2018, the Board filed its Application for Cross-Enforcement of its March 20, 2018 Decision and Order. (USCA Case # 18-1156, Doc. No. 1734592).

STATEMENT OF FACTS

I. Background and Bargaining History

Between September 4, 2014 and May 2016, DirectSat and the Union conducted approximately twenty-four bargaining sessions for a first contract and reached tentative agreements on many non-economic issues. (JA 57). On November 12, 2014, DirectSat presented its first New Product Lines proposal ("Company Proposal No. 29") to the Union. (JA 57, 79). The proposal addressed whether future

products or services other than the installation and servicing of satellite television services would be deemed bargaining unit work. Id. On December 10, 2014, the Union presented DirectSat with a counterproposal to Company Proposal 29. (JA 57, 80). On September 15, 2015, DirectSat presented the Union with its second New Product Lines proposal ("Company Proposal No. 74"). (JA 57, 81). On September 16, 2015, the Union presented DirectSat with a counterproposal to Company Proposal No. 74. (JA 57, 82).

On November 4, 2015, DirectSat presented the Union with a new Proposal ("Company Proposal No. 78"), replacing Company Proposal No. 74, which contained the following language:

> In the event the Employer is engaged with respect to product or services other than those pursuant to its Home Service Provider agreement with DirecTV such work shall not be deemed unit work. . . . [(JA 57, 83).]

Company Proposal No. 78 addressed the circumstances under which unit employees could perform such unit work and the determination of the pay for such work.

* * *

II. The Union's Information Requests and the Shifting Reasons for Wanting the Full, Unredacted HSP Agreement

On November 23, 2015, the Union's Business Representative Dave Webster ("Webster"), sent an email to DirectSat's attorney, Eric P. Simon ("Simon")[3] stating:

> [O]ne of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal.

(JA 57, 84-85). On December 4, 2015, DirectSat, through its Human Resources Director, Lauren Dudley ("Dudley"), responded to the Union via email and provided all portions of the HSP agreement identifying the scope of work DirectSat provided to DirecTV pursuant to the HSP agreement. (JA 58, 86-91). Specifically, on page 1, in a section entitled "Appointment of Contractor" the HSP agreement references the "'Services' or 'Fulfillment Services'" DirectSat provided to DirecTV and such services are defined in Exhibit 1.a.i. of the HSP agreement. (JA 89). DirectSat provided to the Union the full Exhibit 1.a.i. of the HSP agreement without redactions as well as the other portions of the HSP agreement relevant to the scope of work issue. After receiving the information relevant to its request, the Union was silent for over two months, apparently satisfied with the information supplied.

[3] At all material times, Simon held the position of DirectSat's outside legal counsel and chief spokesperson in connection with collective bargaining negotiations between DirectSat and the Union. (JA 56).

On February 16, 2016, Webster sent another information request to Simon seemingly based on a suspicion of a joint-employer relationship between DirectSat and DirecTV. Webster wrote:

> I have heard that AT&T has extended the DirecTV contract with DirectSat for another 3 years. With AT&T & DirectSat both Installing [sic] the DirecTV Dish we need to understand the relationship between AT&T & DirectSat and the shared work. Please send a copy of the current agreement between DirectSat & AT&T/DTV for use in bargaining.

(JA 58, 92).[4]

On February 20, 2016, Simon responded to Webster's February 16th email stating:

> We have no idea what you have heard or whom you have heard it from, but your "information" is erroneous. DirectSat has entered into no new agreements with AT&T. In early 2015, DirecTV extended its contract with DirectSat through 2018, but there has been nothing further.
>
> As to the substance of your request, you seem to assert is relevant because you believe DirecTV (I assume you refer to AT&T because of the recent acquisition of DirecTV by AT&T) and DirectSat have "shared" work. Again, you are mistaken. There is no "shared" work. As far as DirectSat is concerned, all of the work is DirecTV's. DirecTV currently has, and always has had, the right to contract as much or as little or none of its satellite TV system installation and service work to DirectSat as it, in its sole discretion, may decide. DirectSat only performs the work that DirecTV authorizes it to perform. DirectSat has never

[4] On or about July 24, 2015, AT&T acquired DirecTV. (JA 58).

> had an exclusive right to install/service DirecTV systems. Just as DirecTV had the ability to decide to whom it would contract with or if it would contract out installation/service work at all prior to the AT&T-DirecTV merger, DirecTV (even as a subsidiary of AT&T) continues to determine what and how much work to contract out. This is not an issue DirectSat has any control over or ever had any control over, and as such is not a mandatory subject of bargaining. Bargaining unit work has been and will continue to be the installation and service of DirecTV systems to the extent and degree DirecTV authorizes DirectSat to perform such work. While Local 21 may have an issue with DirecTV's subcontracting of such work, it is not relevant to our negotiations. [(JA 58, 93).]

On March 18, 2016, the Union reversed course again when Webster sent a third request for the HSP agreement. This time, the Union wanted it "because of the reference [to the HSP agreement] in the New Product Lines proposal." (JA 59, 94).

The Parties met for a bargaining session on March 22, 2016. (JA 59). At that session, Simon acknowledged the Union's March 18, 2016 request for a full copy of the HSP agreement. Id. Simon stated that DirectSat had already provided the Union with the relevant portions of the HSP agreement. Id. Then, at the same session, the Union presented its counterproposal to Company Proposal No. 78 (New Product Lines), which referenced the HSP agreement. (JA 95). The Union apparently had enough information from the HSP agreement to reference it in the Union's own New Product Lines counterproposal. (Id.).

On April 5, 2016, the Union requested information relating to the metrics DirecTV established to evaluate DirectSat's performance. (JA 96). Specifically, the

Union sought, "information and relevant documents to show how the technician's scorecard is determined [n]ot only the metrics, but how the metrics are determined and by whom." (Id.). The next day, April 6, 2016, DirectSat provided the Union the "current metrics established by DirecTV to measure the performance of DirectSat." (JA 99-102).[5]

On May 19, 2016, shifting reasons yet again, the Union renewed its request for the full, unredacted HSP agreement to "evaluate the control" DirecTV had over DirectSat. Webster sent an email to Simon stating:

> Mr. Simon,
> In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in additional to all current agreements with sub contractors [sic], to evaluate the extent of control of DirectSat by DirecTV/AT&T.

(JA 59-60, 103).

Significantly, by this time, the Union was not asserting a need for the full HSP agreement based on the New Product Lines proposals.

On May 19, 2016, at 10:28 a.m. Simon responded:

[5] Webster's April 5th email also renewed the Union's request for a full copy of the HSP agreement "because of the reference [i]n the New Product Lines proposal." (JA 96). However, DirectSat did not furnish that information because DirectSat already had provided the relevant portion of the HSP agreement, which described the products and services covered by the HSP agreement, and the Union never said that response was inadequate or why. (JA 58, 86-91).

> Dear Mr. Webster: We have already provided you with all relevant information regarding this request. We see no reason to supplement our response.

(JA 60, 104).

On May 23, 2016, Simon faxed a letter to Webster explaining why DirectSat was declining to provide a complete copy of the HSP agreement. (JA 60, 105-106). Simon wrote:

> The request for the full copy of the HSP agreement to evaluate DirecTV's control over DirectSat is irrelevant to negotiations between DirectSat and Local 21 regarding terms and conditions of employment of DirectSat employees. The 'extent of control' of DirecTV over DirectSat has no bearing on negotiations over wages, hours, or other terms and conditions of employment which are exclusively controlled by DirectSat. As previously explained to you at the table. DirecTV does not, and has no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. These decisions are vested exclusively in DirectSat. For the 2+ years since Local 21 was certified as the representative of employees of DirectSat's Chicago South (now South Holland location), DirectSat has bargained in good faith over the wages, hours and other working conditions of employment of unit employees. DirecTV has no role in these negotiations. DirectSat has never asserted that it cannot agree to a proposal on any issue because DirecTV might disapprove. Nor is the ability of DirectSat to enter into a collective bargaining agreement with Local 21 subject to approval by DirecTV.
>
> DirectSat has provided Local 21 with those portions of the contract with DirecTV which may have some relevance to our negotiations – the scope of work covered by the HSP agreement and the metrics used by DirecTV to evaluate the performance of DirectSat under the HSP agreement.

> (DirectSat did not object to providing this information on the basis that while DirectSat has fully authority to set performance metrics for unit technicians, DirectSat has stated that the metrics established by DirecTV to evaluate DirectSat help inform DirectSat in establishing performance metrics for technicians.)

(JA 15-106). On May 24, 2016, the Parties met for a collective bargaining session at which the New Product Lines proposal was discussed. (JA 60).

SUMMARY OF ARGUMENT

The Board mistakenly found DirectSat had a duty to furnish the full, unredacted HSP agreement to the Union. DirectSat's Petition for Review should be granted and the Board's Cross-Application for Enforcement should be denied because the Board's Decision and Order: 1) departed from established precedent requiring a party seeking information not presumptively relevant to first establish the relevance of the requested information; 2) adopted the ALJ's illogically circular conclusion – that the Union is entitled to verify the absence of relevant information by accessing such information without first establishing its relevance; and 3) denied DirectSat's due process rights by finding a violation of the Act even though no facts were ever presented to support the relevance of the full, unredacted HSP agreement. For these reasons, discussed more fully below, the Board's rubber stamp of the ALJ's recommended Order constituted reversible error.

BASIS FOR STANDING

DirectSat defended against the claims in the underlying administrative proceedings before the Board. As a person aggrieved by a final Order of the Board, DirectSat has standing to obtain review from this Court pursuant to 29 U.S.C. § 160(f).

ARGUMENT

STANDARD OF REVIEW

When the Board acts pursuant to the NLRA, "Congress requires it to act in a reasoned fashion, not arbitrarily and capriciously." Nathan Katz Realty v. NLRB, 251 F.3d 981, 994 (D.C. Cir. 2001) (internal citations omitted). Accordingly, although this Court's "review is deferential, [it is] not merely 'the Board's enforcement arm. It is [this Court's] responsibility to examine carefully both the Board's findings and its reasoning[.]'" GE v. NLRB, 117 F.3d 627, 630 (D.C. Cir. 1997) quoting, Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35, 42 (D.C. Cir. 1980).

This Court has "repeatedly told the Board that 'silent departure from precedent' will not survive judicial scrutiny." Randell Warehouse of Ariz., Inc., 252 F.3d 445, 448 (D.C. Cir. 2001) (internal citations omitted). Specifically, the Board "cannot ignore its own relevant precedent but must explain why it is not controlling." Lemoyne-Owen Coll. v. NLRB, 357 F.3d 55, 60 (D.C. Cir. 2004) (internal citations omitted). Thus, "[i]f the Board chooses to exercise its discretion, it must explain its

action, and its explanation must reflect reasoned decision-making." Id. (internal citations omitted).

Further, to the extent that the Board's decision denied DirectSat due process, this Court owes it no deference. J.J. Cassone Bakery, Inc. v. NLRB, 554 F.3d 1041, 1044 (D.C. Cir. 2009). As such due process claims are entitled to *de novo* review. J.J. Cassone Bakery, Inc., 554 F.3d at 1044. "[U]nder the system of law guaranteed by our Constitution, the subsidiary facts must be reached from the evidence and the ultimate facts from the subsidiary facts, not arbitrarily or by assumption or conjecture or by a process contrary to reason, but according to reason." Bethlehem Steel Co. v. NLRB, 120 F.2d 641, 667 (D.C. Cir. 1941).

I. THE BOARD ERRED IN FINDING DIRECTSAT HAD A DUTY TO FURNISH A COPY OF THE FULL, UNREDACTED HSP AGREEMENT BECAUSE ITS RELEVANCE WAS NEVER ESTABLISHED

An employer's duty to bargain in good faith under the Act includes the duty to furnish *only relevant* information *necessary* for the union to perform its functions as representative of the bargaining unit. Country Ford Trucks, Inc. v. NLRB, 229 F.3d 1184, 1191 (D.C. Cir. 2000) (emphasis added). For "[i]nformation related to the wages, benefits, hours, working conditions, etc. of represented employees" relevance is presumed. Id. (internal citation omitted). However, information that does not involve the bargaining unit is not presumptively relevant, and the burden rests on the requesting party to establish that such information is relevant and

necessary to a legitimate issue of bargaining. U.S. Testing Co. v. NLRB, 160 F.3d 14, 19, (D.C. Cir. 1998); see also, Disneyland Park, 350 NLRB 1256, 1258, fn. 5 (2007) (citing, Richmond Health Care, 332 NLRB 1304, 1305 n. 1 (2000), enf'd., 300 Fed. Appx. 717 (11th Cir. 2008)); Trim Corp. of Am., Inc., 349 NLRB 608 (2007) (information concerning the existence of an alleged alter-ego operation is not presumptively relevant). A union seeking such information must demonstrate its relevance. The union must "demonstrate a reasonable belief supported by objective evidence" that the desired information is both relevant and necessary. See, Shoppers Food Warehouse Corp., 315 NLRB 258, 259 (1994). The explanation of relevance "must be made with some precision, and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." Disneyland Park, 350 NLRB 1256, 1258 n.5 (2007) (citations omitted). The Union did not satisfy this standard on this record.

As a matter of law, DirectSat was not obligated to furnish a full, unredacted copy of the HSP agreement because the Union's request for it was not presumptively relevant on its face. Further, the Union failed to otherwise establish that the redacted portions of the HSP agreement DirectSat were relevant to the scope of work issue, or, for that matter, any other subject of bargaining. Under established Board precedent the Union was required to "demonstrate a reasonable belief supported by objective evidence" that the desired information (i.e., the full, unredacted HSP

agreement) was both relevant and necessary to determine the scope of work issue. Shoppers Food Warehouse Corp., supra, 315 NLRB at 259. It never did. See, Island Creek Coal Co., 292 NLRB 480, 490 n. 19 (1989) ("Although the relevance of the Union's unexplained request for a copy of the merger documents might have been apparent in another context, here it must be remembered that the [Union] already had demanded and received portions of those documents that it had indicated must be supplied . . . [W]e find that, given the lack of explanation, as well as the relative remoteness in time of the requested information, the Union had not demonstrated the relevance of those documents."). In fact, the record supports finding the full, unredacted HSP agreement was not necessary for the Union to bargain over the scope of work issue because the Union had enough information from the HSP agreement to reference it in the Union's own New Product Lines counterproposal on March 22, 2016. (JA 95). Tellingly, the Union never stated Simon's April 6, 2016 information request response was inadequate or why.

The United States Court of Appeals for the Fourth Circuit addressed this precise issue – the duty of the employer to furnish information in response to a request for information not presumptively relevant contained within an agreement between the employer and a third party – and found the union was not entitled to such information. Southern Ohio Coal Co., 315 NLRB 836, rev'd, 87 F.3d 1309 (4th Cir.), reported in full at, No. 95-1000, 1996 U.S. App. LEXIS 13358 (June 5,

1996).[6] In Southern Ohio Coal Co., the employer announced to the union, by letter, it had sold one of its mines to an unrelated party who agreed to assume the employer's obligations under an existing wage agreement between the employer and the union. The employer enclosed with the letter "an excised portion of the purchase and sale agreement" relevant to the purchaser's assumption of obligations under the wage agreement. 315 NLRB at 838.

The union requested the entire purchase and sale agreement. Id. at 839. The employer denied the request stating "virtually all of its provisions are completely and utterly irrelevant to any legitimate or legal interest of the International union or any of its affiliates." Id. The Board found that the entire sales agreement was relevant and necessary for the union to fulfill its statutory obligations, particularly to evaluate and process the grievances the union filed before and after the sale. Id. The Board also found, as it improperly did here, relevance of the entire agreement could be established because the union had the right to verify the employer's "version of what is in, or what is not in, the sale agreement." Id. at 845.

The Fourth Circuit expressly rejected the Board's finding because relevance of the full, unredacted purchase and sale agreement was never established. Southern

[6] As discussed infra Point II (A)(1) the ALJ cited the Board's decision in Southern Ohio Coal Co., 315 NLRB 836 (1994) as controlling precedent even though it was reversed by the Fourth Circuit. 87 F.3d 1309 (4th Cir. 1996). (JA 263-264).

Ohio Coal Co., 87 F.3d 1309, reported in full at, No. 95-1000, 1996 U.S. App. LEXIS 13358 *10. The Fourth Circuit stated:

> Although we understand District 31's concern, we do not believe providing it with the entire Sale Agreement properly disposes of this case, particularly because it is undisputed by the NLRB and by SOCCO that the majority of the Sale Agreement's provisions are irrelevant to the issues District 31 attempts to clarify. Their concession directly contradicts the NLRB's reasoning that the entire document is relevant and necessary to District 31's statutory obligation to represent its members. We do not understand, however, how the NLRB made such a determination without ever having examined the document in question. Thus, we remand the case to the NLRB[.]

Id. On remand, the Fourth Circuit instructed the NLRB to establish the relevance of the sales agreement and its necessity to bargaining first and only then was the union entitled to "receive excised copies of those provisions" which are "directly and unquestionably relevant to the issues raised by District 31." Id.

Critical to the relevancy analysis of Southern Ohio Coal Co., was the fact that at the time of the request, the employer had sold its business and the union had filed grievances concerning the rights of employees on layoff status at the time of the sale. Id. at *8. Even given this purportedly "objective evidence," which arguably may have supported a "reasonable belief" that the entire purchase and sale agreement was relevant, the Fourth Circuit was not persuaded that such evidence rendered the entire

agreement both relevant and necessary for the union to perform its statutory duties. Id.

Here, there is no "objective evidence" in the record to support a "reasonable belief" by the Union that the *entire* HSP agreement was relevant and necessary to bargaining. Shoppers Food Warehouse Corp., supra, 315 NLRB at 259. Nevertheless, the Board directed DirectSat to produce the entire, unredacted agreement simply because it was referenced in the New Product Lines proposal. This was arbitrary and capricious. See Titanium Metals Corp. v. NLRB, 392 F.3d 439, 446 (D.C. Cir. 2004) ("The Board's decision will be set aside when it has no reasonable basis in law, fails to apply the proper legal standards, or departs from established precedent without reasoned justification.").

Neither the Union nor the General Counsel ever articulated, let alone established, what specific information in the HSP agreement beyond that which DirectSat furnished might be relevant. Similarly, the Board failed to identify a single substantive provision of the HSP agreement which may have been relevant to the negotiations.[7] The failure of the Board to identify a single substantive provision even

[7] The HSP agreement like virtually all commercial agreements between sophisticated parties contains many provisions, which indisputably have nothing to do with terms and conditions of employment. For example an indemnification provision or a provision related to payments for services provided under the agreement (both of which exist in the HSP agreement), logically do not have any relevance to the definition of the types of services DirectSat provided to DirecTV.

arguably related to the definition of work provided pursuant to the HSP agreement, "directly contradicts the NLRB's reasoning that the entire document is relevant." 1996 U.S. App. LEXIS 13358, *10. As in Southern Ohio Coal Co., the complete, unredacted HSP agreement is not relevant, and DirectSat has no duty under the Act to furnish it.[8]

Further, the Board has acknowledged an employer's ability to redact irrelevant information from documents which contain relevant information. DirecTV U.S., 361 NLRB No. 124 (2014) (authorizing DirecTV to redact irrelevant information). The outcome should be no different here. For example, in DirecTV U.S., the union made a broad information request for nineteen separate items including "[a] statement and description of all company personnel policies, practices or procedures" as well as "[a] statement and description of all wage and salary plans." Id. at *6-7. Based on how the union phrased the requests, the Board found the above information was neither necessary nor relevant as it did not relate to

[8] In its remand instructions to the Board in Southern Ohio Coal Co., the Fourth Circuit explained that the NLRB could conduct an *in camera* review of the purchase agreement at issue. 1996 U.S. App. LEXIS 13358, at *12. Such a review would be inappropriate here because unlike in Southern Ohio Coal Co., at the time of the information request, the Union had not filed any grievances to which the HSP agreement pertained, and there was no sale, which would make a document like a sales agreement potentially relevant. Rather, DirectSat has engaged in good faith bargaining with the Union for years, has never asserted or suggested that the HSP agreement impacts the bargaining unit in any way other than with respect to the definition of the scope of work, and DirectSat already produced to the Union all of the unredacted portions of the HSP agreement relevant to that issue.

bargaining unit employees. Id. at *9, n. 3. The Board denied the General Counsel's request for summary judgment, and held that the employer need only furnish necessary and relevant information in response to the overbroad request. Id.

In DirecTV U.S., the Board recognized that relevant information may be contained within documents with otherwise irrelevant information to which the union has no right. The Board also recognized that when complying with information requests, employers are the proper party to discern which documents or subsets thereof contain relevant information and which do not. Id. ("[S]hould any requested document contain information unrelated to unit employees, [DirecTV] may redact such information."). Critically, the Board in DirecTV U.S., did not find or even suggest that the union had the right to verify the employer's redactions, unlike the ALJ and Board improperly found here.

There is no dispute that DirectSat provided the Union with those portions of the HSP agreement identifying the work DirectSat performed under the HSP agreement. (JA 86-91). As such, DirectSat was under no obligation to provide the Union with the redacted portions of the HSP agreement because there is no evidence in the record that the balance of the HSP agreement contains any information directly related to the employment terms and conditions of unit employees. The inquiry should end there.

The Board's Decision and Order never addressed the failure to establish relevance of the entire HSP agreement, with respect to Proposal No. 78 (New Product Lines) or otherwise. That, alone, was reversible error. The speciousness of the Board's conclusion that the full, unredacted HSP agreement is somehow relevant to bargaining is compounded by the Union's ever-mutating rationale for its request for the entire HSP agreement. (JA 84-85, 92, 94, 103).

The record is clear. The Union never specified what information it needed after DirectSat supplied the three unredacted pages of the HSP agreement describing the services DirectSat provided to DirecTV. While the Union made repeated requests for the entire HSP agreement, it never explained why the information DirectSat furnished was insufficient. Even in his March 18, 2016 email, Webster never explained what additional information relevant to the New Product Lines proposal he sought to obtain or why. (JA 58, 94).

Nevertheless, without having the full HSP agreement, Webster proffered the Union's New Product Lines counterproposal expressly referencing the HSP agreement on March 22, 2016. (JA 95). Thus, by its own conduct the Union demonstrated that it had sufficient information to respond to DirectSat's New Product Lines proposal and that it did not believe the entire unredacted HSP agreement was relevant or necessary to perform its collective bargaining duties. This conclusion is further confirmed by the fact that two months later, when the Union

again requested a full, unredacted copy of the HSP agreement, it asserted its new joint-employer rationale in support of that request. (JA 84-85, 92).

Since the Union could not articulate a legitimate reason for the production of the full, unredacted HSP agreement, the Board's adoption of a rationale that neither the Union, the General Counsel, nor the ALJ asserted undermines its conclusion. Accordingly, it was reversible error for the Board to find a duty to furnish the Union with a copy of the full, unredacted HSP agreement without first finding the relevance of such information.

II. THE BOARD ENGAGED IN REVERSABLE ERROR BY RELYING ON THE ALJ'S MISAPPLICATION OF BOARD PRECEDENT AND THE ALJ'S CIRCULAR LOGIC TO FIND RELEVANCE OF THE FULL, UNREDACTED HSP AGREEMENT

The Board affirmed the ALJ's "rulings, findings, and conclusions" to find that DirectSat had a duty to furnish the complete, unredacted HSP agreement, and addressed the underlying merits of this case in only four sentences citing no case law. (JA 258-259). To the extent the Board adopted the ALJ's rationale and legal conclusions – which is not apparent on the face of the Decision and Order because the Board did not engage in any analysis of the ALJ's logic – such adoption of the ALJ's rationale and conclusion was reversible error because the ALJ misapplied

Board precedent and engaged in circular reasoning to find a violation of the Act. (JA 263-264).[9]

A. The Board Adopted the ALJ's Misapplication of Board Precedent

ALJ Muhl concluded "that relevance [of the entire HSP agreement] is established here, because the Union is entitled to verify DirectSat's claim it has provided all portions of the HSP agreement relevant to the scope of unit work." (JA 264). To reach this conclusion, the ALJ relied on Caldwell Mfg. Co., 346 NLRB 1159 (2006); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Shoppers Food Warehouse Corp., 315 NLRB 258 (1994); Piggly Wiggly Midwest, LLC, 357 NLRB 2344 (2012); Knappton Maritime Corp., 292 NLRB 236, 239 (1988); Southern Ohio Coal Co., 315 NLRB 836 (1994), rev'd, 87 F.3d 1309 (4th Cir. 1996); and Olean General Hospital, 363 NLRB No. 62 (2015). However, as a matter of law, proper application of all of these cases warrants the opposite outcome: a finding that DirectSat did not have a duty to furnish the Union with a copy of the full, unredacted HSP agreement.

(1) The Cases Addressing the Right to Verify Specific Factual Representations Made During Bargaining Are Inapposite Because DirectSat Never Made Such Representations

As an initial matter, none of the aforementioned cases relied upon by the ALJ held that the right to verify arises when an employer states it has provided the union

[9] For purposes of this Petition, DirectSat assumes the Board adopted the ALJ's rationale and legal conclusions.

with all relevant information in response to an information request. Indeed, DirectSat is not aware of any case, which supports such an illogical conclusion. Further, the ALJ cited Southern Ohio Coal Co., 315 NLRB 836 (1994) for the proposition that "an employer telling a union its version of what was in, and not in, a sales agreement did not satisfy the union's right to have access to an unexcised copy of that agreement." (JA 264). However, as addressed, supra, the Fourth Circuit Court of Appeals reversed this holding because the relevance of the full, unredacted sales agreement had not been established. Southern Ohio Coal Co., 87 F.3d 1309 (4th Cir.), reported in full at, No. 95-1000, 1996 U.S. App. LEXIS 13358 (June 5, 1996). Thus, the ALJ improperly relied on this case to support finding a right to verify what was in, and not in, the HSP agreement.

In Caldwell, the Board affirmed an employer has a "duty to provide information that would enable the bargaining representative to assess the validity of claims the employer has made in contract negotiations." 346 NLRB at 1160. There, the employer "premised its bargaining positions on specific assertions," namely that certain concessions were necessary to make the employer more competitive. Id. at 1159. Accordingly, the employer had a duty to supply information in support of these "specific factual representations in support of its proposals" with data. Id.; see also Truitt Mfg. Co., supra, 351 U.S. at 152-53 (if "an argument is important enough to present in the give and take of bargaining, it is important enough to require some

sort of proof of its accuracy."). Caldwell makes clear that the "right to verify" arises only in response to "specific factual representations" made during bargaining. 346 NLRB at 1160.

Here, in affirming the ALJ, the Board mischaracterized DirectSat's response to a request for information and assertion that it provided the Union with all provisions of the HSP agreement relevant to the definition of unit work as a "specific assertion" in support of a proposal. The Board's characterization is erroneous on its face. Board precedent establishes a right to verify assertions made with respect to only certain bargaining positions (see, e.g., Caldwell), but not the right to verify responses to information requests. Accordingly, the Board improperly found the Union was entitled to verify DirectSat's claim - that it had furnished all the information relevant to the Union's request as it related to Proposal No. 78.

The Board also adopted the ALJ's misapplication of Olean General Hospital, 363 NLRB No. 62, slip op. at 22 (2015). There, the information request at issue concerned a patient care survey listing forty-some patient care deficiencies. Id. After learning of the deficiencies, the union requested a copy of the report. The union explained that since staffing was an issue in bargaining, it wanted to know if staffing had been implicated in the report. Id. at 23. Two days after the union made its request, the hospital issued a memo to unit members and others warning it had zero tolerance for failures to correct deficiencies. Id. Then, the union renewed its request

for the report asserting it raised potential discipline issues light of the "zero tolerance" statement in the memo. Id. at 29. The employer refused to furnish it. Significantly, the employer never asserted that the union requested irrelevant information.

Before the Board, the employer argued a confidentiality interest in the report citing controlling state law, which protected such information from disclosure. Id. 25-26. The Board found that the hospital had "a legitimate and substantial confidentiality interest in the survey and its contents." Id. at 27. However, the Board held the union's need for the requested information for bargaining and for the disciplinary implications outweighed the hospital's legitimate confidentiality interest. Id. at 31.

Here, in stark contrast to Olean General Hospital, DirectSat has consistently maintained it has no duty to furnish the full, unredacted HSP agreement because it is not related to terms and conditions of employment. DirectSat never asserted a confidentiality defense. Thus, the Olean General Hospital balance between the union's duty as bargaining representative and the employer's confidentiality concerns does not apply.[10]

[10] Moreover, in Olean General Hospital there were clear facts to establish relevance of the patient care survey report – namely that as a result of the deficiencies listed in the report, the hospital warned unit employees that it had zero tolerance for failing to correct such deficiencies. Here, there are no such facts to support relevance of the full, unredacted HSP agreement relevant.

(2) The Board Improperly Relied on Cases Addressing Joint Employer/Alter-ego Relationships Because the ALJ Found the Union Had No Reasonable Belief Such Relationship Existed

The Board mistakenly adopted the ALJ's reliance on Piggly Wiggly Midwest, LLC, 357 NLRB 2344 (2012) and Knappton Maritime Corp., 292 NLRB 236 (1988) both of which addressed the right to verify the existence of a joint employer or alter ego relationship. (JA 263-264). However, those cases do not apply here because the ALJ found, and the Board affirmed, the Union had no valid basis to suspect a joint employer or alter ego relationship between DirectSat and DirecTV (and thus DirectSat had no duty to furnish the full, unredacted HSP agreement on that theory). The legal analysis should have ended there.

Piggly Wiggly concerned a union's reasonable suspicion of an alter-ego relationship and request for a copy of a sales agreement. The union established relevance of the sales agreement. The objective factual basis supporting relevance was "apparent" when the employer announced to the union that it sold two of its unionized grocery stores to a franchisee who only one month earlier had been the store manager of the same store for Piggly Wiggly. See id. at *2344 ("We agree with the judge that the Union established the relevance of the information to its concern that the franchisees were alter egos of the Respondent."). The Board therefore found the union was entitled to a copy of the purchase agreement because the union had the right to verify the employer's claims that the sale was to a bona

fide purchaser and not an alter-ego. In the absence of any such relevance finding here, the basis for production of the sales agreement in Piggly Wiggly does not apply. The full, unredacted HSP agreement is not equivalent to the Piggly Wiggly sales agreement.

Similarly, in Knappton Maritime Corp., 292 NLRB 236 (1988), on a stipulated factual record, the Board held the employer violated the Act by refusing to provide the union with a complete copy of a purchase and sale agreement. The Board found the union alleged sufficient objective facts to support its claim that an alter ego relationship existed - the sale of the employer's operations to a newly formed corporation and an arbitrator's decision finding that the newly formed corporation was controlled by Knappton. The entire sales agreement was clearly relevant because "the information contained in the agreement could give some indication of common ownership, financial control, common management, or interrelation of business operation between the two companies." Id. at 239. Knappton is distinguishable because there are no objective facts in this record establishing the relevance of the entire HSP agreement. In the absence of any objective facts demonstrating the relevance of the entire HSP agreement, Knappton Maritime Corp. does not apply. The full, unredacted HSP agreement is not equivalent to the Knappton Maritime Corp. sales agreement.

B. The Board Erred By Implicitly Adopting the ALJ's Circular Reasoning that the Union Is Entitled to Irrelevant Information to Verify the Irrelevance of Such Information Because Such an Illogical Finding Is Inherently Arbitrary and Capricious.

A conclusion of the Board premised on circular logic is a finding which is "contrary to reason," and thus, warrants reversal. Bethlehem Steel Co. v. NLRB, 120 F.2d 641, 667 (D.C. Cir 1941). By affirming the ALJ's "rulings, findings, and conclusions," (JA 258), the Board implicitly adopted the ALJ's flawed circular logic that the Union should be permitted to verify the employer's challenge to relevance of requested information by granting it unfettered access to that very same information.

The Board's implicit adoption of this logic obliterates the relevancy requirement in all information request cases. This Court cannot permit such an outcome. If it does, then every time an employer denies a union's request for information which is not presumptively relevant a union will, necessarily, gain all access to such information because the union would have the "right to verify" the employer's assertion that the information is irrelevant.

The Board's entire rationale is predicated on an assumption, unsupported by any evidence, that *there might be* something else in the remainder of the HSP agreement that *might* shed light on the provisions of the HSP agreement DirectSat furnished. The record is devoid of any evidence to support such speculation. None of the cases cited by the ALJ or relied on by the Board – and indeed no Board case

of which DirectSat is aware, has ever found relevance and a duty to furnish are established because a union is entitled to verify the employer's claim that it has provided all of the relevant information to assess an employer's assertion that information not produced is irrelevant. Relevance must be established before the employer is obligated to produce information. That is black letter Board law. Relevance is not established under the Act and Board law simply because the employer challenges the relevance of the requested information. To conclude otherwise is circular and illogical. See, e.g., Piggly Wiggly, 357 NLRB at 2355 ("*once* the burden of showing the relevance of nonunit information is satisfied, the duty to provide the information is the same as it is with presumptively relevant unit information.") (emphasis added).

The Board did not even address this logical error despite DirectSat raising it in its exceptions brief. Instead, without explanation, the Board adopted it with all of its flaws. As a result, reversal is warranted.

III. THE BOARD ERRED IN FINDING NO DUE PROCESS VIOLATION

In concluding that DirectSat's due process rights were not violated by finding a violation of the Act on a legal theory the General Counsel never argued, the Board improperly applied the standard set out in Local 58, Int'l Bhd. of Elec. Workers (IBEW), AFL–CIO (Paramount Industries, Inc.), 365 NLRB No. 30 (2017) and Sierra Bullets, LLC, 340 NLRB 242 (2003). (JA 258).

The Board found:

> When analyzing whether a judge's finding of a violation on a theory that was not clearly articulated by the General Counsel violates a respondent's due process rights, the Board considers (1) whether the language of the complaint encompasses the legal theory upon which the violation was found; (2) whether the factual record is complete, or, in other words, **whether the facts necessary to find a violation under the theory in question were litigated;** (3) whether the law is well established; and (4) the General Counsel's representations about the theory of violation, and the differences between the litigated theory and the theory upon which the judge relied in finding the violation. [citing Paramount Industries, Inc., supra, at 4 n. 17. (Decision and Order at 1) (emphasis added).]

The Board explained that "[w]e agree, for the reasons stated by the judge, that the first two factors were satisfied in this case. Furthermore, although the judge omitted the other two factors from his analysis, on this record we are satisfied that both are met as well." Id.

Although the Board recognized that the ALJ did not analyze two of the four relevant factors, it was still "satisfied both were met as well." (Decision and Order at 1). But this cannot be so. Neither of the factors the ALJ ignored is satisfied on the facts or the law. Unions have a right "to assess and verify for themselves the accuracy of employers' claims in bargaining." (JA 258); see e.g., NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152–153 (1956); Caldwell Mfg. Co., 346 NLRB 1159, 1160 (2006); Shoppers Food Warehouse Corp., supra, 315 NLRB at 259. However, the "right to verify" is not an unfettered right. See, supra, Point II (A)(1). The fact that

the parties litigated pursuant to a stipulated record does not mean DirectSat could not have relied on representations about the theory of violation. Indeed, the General Counsel's theory based on an alleged joint employer relationship was made clear to DirectSat since the Complaint issued and the parties negotiated over the stipulated factual record. The fact that the parties filed briefs to the ALJ the same day does not change the outcome as the Board posited. (JA 258-259). Indeed, in its brief to the ALJ, the General Counsel confirmed its only theory was the Union's purported belief in a joint employer relationship between DirectSat and DirecTV (JA 172) ("Counsel for the General Counsel argues that the Union is entitled to a full unredacted copy of the HSP agreement to resolve its concern as to whether Respondent and DirecTV are joint employers"), and the ALJ and the Board rejected that theory but invented their own to find a violation.

In a concurring opinion in Teachers Coll., Columbia Univ. v. NLRB, Judge Silberman contested the reasonableness of the Board's view expressed in Piggly Wiggly Midwest, LLC, 357 NLRB 2344, 2344 (2012), which "seems to raise an issue of due process." 902 F.3d 296, 308 (D.C. Cir. 2018) (Silberman concurring). Judge Silberman wrote:

> I write separately to contest the reasonableness of the Board's view expressed in Piggly Wiggly Midwest, LLC, 357 N.L.R.B. 2344, 2344 (2012), which we note in footnote 1 but upon which we do not rely. The Board there said that although a union seeking information concerning non-bargaining unit activities must have a factual basis to

> support the relevance to the bargaining unit of that information, it need not disclose those facts to the employer; it is sufficient that the General Counsel present those facts to the ALJ at an unfair labor practice hearing.
>
> I think that is a paradigmatic example of arbitrary and capricious decision-making. An employer under Board law must accommodate a union's request for non-bargaining unit information if it is relevant to bargaining unit concerns, but can legitimately refuse if the union has no factual basis for asserting that relevance. That decision must be made at the time of the union's request, and if the employer is wrong, it violates the law. It seems to me to be absurd for the Board to hold that an employer who is not faced with alleged facts supporting a union's claim of relevance at the time of the request - and therefore apparently acting within the law - can be retroactively determined to have violated the Act by virtue of factual evidence first put on by the General Counsel at a hearing before an ALJ. This seems to even raise an issue of due process. [Id.]

The due process issue Judge Silberman identified is present and compounded here. Although the ALJ and the Board rejected all of the General Counsel's theories of a violation of the Act, DirectSat was found to have violated the Act and directed to furnish a full, unredacted copy of the HSP Agreement to the Union absent any finding of relevance of the entire agreement based on a legal theory the Union and the General Counsel never advanced. Indeed, to this day, more than two years after Complaint issued at the Board, DirectSat *still has not been presented* with any factual basis to support relevance of the full, unredacted HSP agreement.

CONCLUSION

The Board's Decision and Order requiring DirectSat to produce a full, unredacted copy of the HSP agreement is unsupported by any evidence in the record or applicable legal precedent. For all the reasons stated herein, and contrary to the Board's findings, conclusions, and order/remedies, DirectSat respectfully submits that this Court grant its Petition for Review and deny the Board's Cross-Application for Enforcement.

Respectfully submitted,

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Dated: February 1, 2019

Counsel for DirectSat USA LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that DirectSat's brief contains 10,802 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

Respectfully submitted,

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Dated: February 1, 2019

Counsel for DirectSat USA LLC

ADDENDUM

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Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 8. [29 § 158.]

(a) It shall be an unfair labor practice for an employer--

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 10. [29 U.S.C. § 160.]

(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .

. . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and

proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court. Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or

wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

CERTIFICATE OF FILING AND SERVICE

I, Simone Cintron, hereby certify that, on February 1, 2019 the foregoing Final Brief for Petitioner was filed through the NextGen system and served electronically on parties in the case.

/s/ Simone Cintron
Simone Cintron